(2)

Supreme Court, U.S.
FILED
MAR 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1281

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

QUME CORPORATION,

Petitioner,

vs.

UNITED STATES INTERNATIONAL TRADE COMMISSION,

--and--

TRIUMPH-ADLER AKTIENGESELLSCHAFT, ADLER-ROYAL BUSINESS MACHINES, INC., NAKAJIMA ALL CO., LTD., SHARP ELECTRONICS CORPORATION and SHARP CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

TOM M. SCHAUMBERG, ESQ.
(Counsel of Record)
JOEL D. KAUFMAN, ESQ.
ALICE A. KIPEL, ESQ.
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4793
(202) 783-0800
Counsel for All Respondents

TERRELL C. BIRCH, ESQ.
BERNARD L. SWEENEY, ESQ.
BIRCH, STEWART, KOLASCH & BIRCH
301 North Washington Street
Falls Church, VA 22046
Counsel for Sharp Corporation and Sharp Electronics Corporation

JOSEPH R. SPALLA, ESQ.
82 Hopmeadow Street
P.O. Box 2000
Simsbury, CT 06070
Counsel for Triumph-Adler Aktiengesellschaft and Adler-Royal Business Machines, Inc.

FREDERICK G. MICHAUD, JR., ESQ.
BURNS, DOANE, SWECKER & MATHIS
George Mason Building
Washington & Prince Streets
Alexandria, VA 22313
Counsel for Nakajima All Co., Ltd.

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

Whether the U. S. Court of Appeals for the Federal Circuit, in affirming the determination of the U. S. Internationl Trade Commission below, misapprehended or grossly misapplied the standard of review applicable to appeals from final determinations of the U. S. International Trade Commission in investigations under 19 U.S.C. § 1337, as amended?

STATEMENT PURSUANT TO RULE 28.1

Respondents have previously submitted their statement pursuant to Rule 28.1 in their Response to Qume's Motion to File a Portion of the Appendix to a Petition for Writ for Certiorari Under Seal, filed with this Court on February 20, 1987.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT PURSUANT TO RULE 28.1	ii
TABLES OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
THERE IS NO BASIS FOR GRANTING THE PETITION AS THE FEDERAL CIRCUIT CORRECTLY APPLIED THE APPROPRIATE STANDARD OF REVIEW	4
THE COMMISSION'S FINAL DETERMINATION MERELY CORRECTED THE ALJ'S ERRORS OF LAW, AND THUS, CREDIBILITY WAS NOT IN ISSUE BELOW	8
THE COMMISSION'S FINAL DETERMINATION, NOT THE ALJ'S ID, WAS PROPERLY BEFORE THE FEDERAL CIRCUIT AND WAS PROPERLY REVIEWED BY THAT COURT	12
THE FEDERAL CIRCUIT'S OPINION DOES NOT DISCOURAGE RESORT TO SECTION 337	14
CONCLUSION	15

TABLE OF AUTHORITIES

CASES:	Page
American Hospital Supply Corp. v. Travenol Labs, Inc., 745 F.2d 1 (Fed. Cir. 1984)	6
Corning Glass Works v. United States Int'l Trade Comm'n, 799 F.2d 1559 (Fed. Cir. 1986)	6
Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938)	6
Dennison Manufacturing Co. v. Panduit Corp., ___ U.S. ___, 106 S. Ct. 1578 (1986)	13
General Motors Corp. v. United States Int'l Trade Comm'n, 687 F.2d 476 (CCPA 1982), *cert. denied*, 459 U.S. 1105 (1983)	14
Jackson v. Veterans Administration, 768 F.2d 1325 (Fed. Cir. 1985)	11
Metz v. Department of Treasury, 780 F.2d 1001 (Fed. Cir. 1986)	7
Naekel v. Department of Transportation, 782 F.2d 975 (Fed. Cir. 1986)	7
SSIH Equip. S.A. v. United States Int'l Trade Comm'n, 718 F.2d 365 (Fed. Cir. 1983)	6,14
Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)	4-7,11
STATUTES:	
Federal Courts Improvement Act of 1982, Pub. Law No. 97-164, § 163(a), 96 Stat. 25 (1982)	14
5 U.S.C. § 557(b)	2,12
5 U.S.C. § 706	6
19 U.S.C. § 1337	*passim*
35 U.S.C. § 102(g)	3,11
35 U.S.C. § 103	3
35 U.S.C. § 112	7
REGULATIONS:	
19 C.F.R. § 210.41	12
19 C.F.R. § 210.53	12

Table of Authorities Continued

	Page
19 C.F.R. § 210.54	2,12
19 C.F.R. § 210.55	12
19 C.F.R. § 210.56	12
FEDERAL REGISTER:	
50 Fed. Reg. 15236 (1985)	3

ST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1281

QUME CORPORATION,

Petitioner,

vs.

UNITED STATES INTERNATIONAL TRADE COMMISSION,

--and--

TRIUMPH-ADLER AKTIENGESELLSCHAFT, ADLER-ROYAL BUSINESS MACHINES, INC., NAKAJIMA ALL CO., LTD., SHARP ELECTRONICS CORPORATION and SHARP CORPORATION,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Respondents, Triumph-Adler Aktiengesellschaft, Adler-Royal Business Machines, Inc., Nakajima All Co., Ltd., Sharp Corporation and Sharp Electronics Corporation ("Respondents"), respectfully request that this Court deny the request of Petitioner Qume Corporation for issuance of a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in the above-entitled proceeding on October 7, 1986.

STATUTES INVOLVED

In addition to the statutes cited by Qume Corporation in its Petition:

5 U.S.C. § 557(b)

A copy of the above statute is annexed hereto.

STATEMENT OF THE CASE

The opinion of the United States Court of Appeals for the Federal Circuit ("Federal Circuit") which is the subject of the instant Petition arises from an appeal of the Final Determination of the U.S. International Trade Commission ("ITC" or "Commission") in an investigation conducted under 19 U.S.C. § 1337 ("Section 337"). Petitioner Qume Corporation ("Qume" or "Petitioner") filed a complaint with the ITC alleging unfair acts in the importation and sale of goods by a number of companies, including the Respondents herein. The ITC instituted an investigation and assigned it to an Administrative Law Judge ("ALJ") to preside over the discovery phase of the investigation and conduct an evidentiary hearing pursuant to the provisions of the Administrative Procedure Act ("APA"). 5 U.S.C. § 557(b) (1982). The ALJ assigned to the case conducted a hearing and then issued an Initial Determination ("ID") including findings of fact and conclusions of law.

Based on errors contained in the ID, Respondents herein sought review of the ALJ's ID by the full Commission pursuant to 19 C.F.R. § 210.54. After examining the petitions for review and the responses thereto, the Commission concluded that there were issues warranting review. The ITC thereupon gave

notice that it would review portions of the ID, including the validity of Claims 1 and 8 of the patent at issue, U.S. Letters Patent No. 4,118,129 ("the '129 patent"). 50 Fed. Reg. 15236 (1985). The issues under review were fully briefed to the Commission by all parties and argued in a hearing before the Commission.

Upon consideration of the ID, the submissions filed by the parties, the transcript of the evidentiary hearing before the ALJ and exhibits entered into evidence and the arguments and presentations made at the Commission's public hearing, the Commission issued its Notice of Termination of the investigation and a 94-page Final Determination, including a 59-page majority opinion, in which it determined, *inter alia*, that Claim 1 of the '129 patent was invalid as obvious within the meaning of 35 U.S.C. § 103 and that Claim 8 of the '129 patent was invalid by virtue of anticipation as set forth in 35 U.S.C. § 102(g). (Petition Appendix at A-15 and A-37).

The Commission's conclusions contrary to those of the ALJ were based primarily on its determination that the ALJ's analysis of the validity of the claims in issue was in error as a matter of law. Specifically, the Commission determined that the ALJ used an incorrect legal standard regarding anticipation of Claim 8 and an impermissibly narrow analysis of the relevant prior art in his inquiry relating to the obviousness issue as it applied to Claim 1. (Petition Appendix at A-26, 33-35).

Qume subsequently appealed the decision of the ITC to the Federal Circuit, Appeal No. 86-507. The Federal Circuit affirmed the Final Determination of the ITC.

REASONS FOR DENYING THE WRIT

1. There is no basis for granting the Petition as the Federal Circuit correctly applied the appropriate standard of review.
2. The Commission's Final Determination merely corrected the ALJ's errors of law and, thus, credibility was not in issue below.
3. The Commission's Final Determination, not the ALJ's ID, was properly before the Federal Circuit and was properly reviewed by that court.
4. The Federal Circuit's opinion does not discourage resort to Section 337.

I.

THERE IS NO BASIS FOR GRANTING THE PETITION AS THE FEDERAL CIRCUIT CORRECTLY APPLIED THE APPROPRIATE STANDARD OF REVIEW.

In its Petition, Qume purports to rely on this Court's decision in *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951) as the basis for finding error in what the Federal Circuit has done in this case. However, neither *Universal Camera* nor the other cases cited in the Petition supports Qume's arguments and, on the contrary, the cases support denial of the Petition.

In *Universal Camera*, this Court reviewed the history of the APA and held that the review of administrative agency determinations by the courts of appeals was one of ascertaining whether, as to mat-

ters of fact, substantial evidence existed in the record before the agency, taken as a whole, to support the agency's determination. Having so stated the function of the courts of appeals, this Court set forth the test for review of such decisions:

> Our power to review the correctness of application of the present standard ought seldom to be called into action. Whether on the record as a whole there is substantial evidence to support agency findings is a question which Congress has placed in the keeping of the Courts of Appeals. This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied. (340 U.S. at 490-491).

Qume, however, never addresses this test and certainly nothing in Qume's Petition indicates that the Federal Circuit "misapprehended or grossly misapplied" the applicable standard.

To suggest as Qume has done that the Federal Circuit did not apply the appropriate standard of review merely because of the court's failure to cite *Universal Camera* directly is totally baseless. In a lengthy footnote, the Federal Circuit set forth the standard of review:

> We note numerous arguments in Qume's opening brief that misconstrue our appellate function by asserting little more than that the ALJ was right and the ITC was wrong. This court does not review the ALJ's initial determination, but rather, reviews the Commission's decision under the standard of re-

> view dictated by 5 U.S.C. § 706. 19 U.S.C. § 1337(c) (1982); *American Hosp. Supply Corp. v. Travenol Labs, Inc.*, 745 F.2d 1, 6 & n.15, 223 U.S.P.Q. 577, 581 & n.15 (Fed. Cir. 1984). A factual finding of the Commission can be overturned only if unsupported by substantial evidence. 5 U.S.C. § 706(2)(E) (1982); *Corning Glass Works v. United States Int'l Trade Comm'n*, No. 85-2632, slip op. at 11 (Fed. Cir. August 27, 1986)[799 F.2d 1559]. The Supreme Court has defined "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). *See also SSIH Equip. S.A. v. United States Int'l Trade Comm'n*, 718 F.2d 365, 382, 218 U.S.P.Q. 678, 692 (Fed. Cir. 1983)["*SSIH*"]. Of course, this court is not so restricted with respect to the Commission's legal conclusions and will reverse those conclusions found to be in error. 5 U.S.C. § 706; *American Hosp. Supply*, 745 F.2d at 6, 223 U.S.P.Q. at 581. (Petition Appendix at A-5).

Thus, the Federal Circuit relied on the same case, *Consolidated Edison*, relied upon by this Court in *Universal Camera*. Moreover, in *SSIH*, the Federal Circuit had already fully addressed the relationship between the burden of proof and the standard of review, quoting from *Universal Camera* at considerable length and applying the standard enunciated therein to its review of ITC decisions. 718 F.2d at 371-72, 379-83. The mere fact that *Universal Camera*

is not cited does not establish that the Federal Circuit did not address the proper standard of review.[1] Rather, the decision of the Federal Circuit must be considered *in toto*. When so examined, it is clear that the Federal Circuit affirmed the legal issues determined by the Commission and found substantial evidence of record to support those conclusions.

The Commission's Final Determination, rather than being a summary rejection of the ALJ's findings and conclusions,[2] was based on the correct application of the law to the evidence of record. Qume has never once argued that the legal framework applied by the Commission was in error. Instead, Qume ignores the errors of law committed by the ALJ, discussed *infra*, and suggests that this case involves nothing more than contrary factual determinations on the part of the Commission and the ALJ. That is simply not the case. The Commission's factual determinations were not inconsistent with those of the ALJ, but instead merely reflect the additional analysis required by the application of the correct legal standard.

In affirming the ITC Final Determination, the Federal Circuit had before it the reasoning of the Commission as set forth in a majority opinion 59 pages

---

[1] While Qume's Petition cites several cases which "applied the *Universal Camera* standard correctly in non-patent cases" those cases themselves do not cite *Universal Camera*. *See Naekel v. Department of Transportation*, 782 F.2d 975 (Fed. Cir. 1986) and *Metz v. Department of Treasury*, 780 F.2d 1001 (Fed. Cir. 1986), cited in Petition at 12.

[2] It should be noted that the ITC adopted the ALJ's findings as to the non-obviousness of Claim 8 and the validity of the '129 patent under 35 U.S.C. § 112. (Petition Appendix at A-34 and A-35-37).

in length. The majority opinion included not only the factual and legal bases from which the Commission's conclusions were drawn, but the errors inherent in the ALJ's ID which mandated reversal. In just the Commission Final Determination, therefore, the Federal Circuit had before it a recitation of sufficient information to determine if the record as a whole provided substantial evidence to support the Commission's Final Determination.[3]

II.

THE COMMISSION'S FINAL DETERMINATION MERELY CORRECTED THE ALJ'S ERRORS OF LAW, AND THUS, CREDIBILITY WAS NOT IN ISSUE BELOW.

Respondents do not intend to address at length in this Opposition the substantive issues affirmed by the Federal Circuit. However, certain inaccuracies in Qume's characterization of the ITC Final Determination are so pervasive in Qume's argument that they cannot go uncorrected.

As summarily stated by Qume:

> The ITC majority decision reversed the ALJ's finding of validity for both Claim 1 and Claim 8 (App. 37). In so doing, the ITC majority rejected (or ignored) the ALJ's findings concerning patent validity and totally failed to provide any explanation as to why the ALJ's analysis of testimony and evaluation of the

---

[3] In addition to the Commission Final Determination, the Federal Circuit had before it a joint appendix of approximately 20,000 pages in length.

> credibility of witnesses concerning invalidity were neither considered nor adopted by the ITC majority. (footnote omitted) (Petition at 8).

First, contrary to Qume's assertions, the ITC's conclusion of invalidity of Claim 1 was based on its determinations that the ALJ's analysis was in error as a matter of law in that he (1) failed properly to define the relevant prior art and the person of ordinary skill in the art; (2) failed properly to consider the prior art references in combination and (3) ignored probative evidence on the issue of the obviousness of Claim 1. (Petition Appendix at A-34-35). The Commission held that:

> . . . [W]e find that the ALJ improperly defined the scope of the relevant prior art as to claim 1. Relevant prior art is that which is "reasonably pertinent" to the problem facing the inventor, and the test is similarity between the elements and purposes of that problem and the asserted prior art reference. The ALJ's definition of the relevant art does not meet that standard in that it ignores one of the key problems faced by the inventor with respect to claim 1, *i.e.*, optical sensing and encoding, and is therefore erroneous as a matter of law. . . . (footnotes omitted) (Petition Appendix at A-33).

Contrary to Qume's implicit contention that the Commission relied for its determination on the testimony of Dr. Bernstein,[4] the Commission did not do

---

[4] Although Qume couches the ALJ's evaluation of Dr. Bern-

so. It stated the basis for its conclusion that Claim 1 was invalid as follows:

> . . . [W]e are of the opinion that the prior art references, the testimony of Mr. Grundherr [the inventor] as to the standard nature of the invention's elements, and the documentary evidence submitted by respondents showed that the claimed combination would have been obvious to the person of ordinary skill in the optical encoder art. . . . (Petition Appendix at A-35).

As the Federal Circuit clearly stated, the "documentary evidence" to which the Commission pointed was "an opinion letter (RXT-175C) written to IT&T by an attorney who, after completing a comprehensive study directed to the validity and enforcement of the '129 patent, questioned the validity of claims 1-7 in light of Dubauskas [a prior art reference patent upon which the Commission relied]." (Petition Appendix at A-3).

Second, as to the invalidity of Claim 8, the ITC's reversal of the ALJ's finding was based on the Commission's determination that the ALJ's conclusion also was based on an error of law. Specifically, the Commission held that

> . . . the ALJ's finding that Grundherr, the inventor of the '129 patent, lacked knowledge

---

stein's expert opinion testimony as a credibility issue, in fact, the ALJ's decision not to rely on Dr. Bernstein's expert opinion testimony was wholly unrelated to witness demeanor and credibility. The ALJ stated merely that he found Dr. Bernstein's testimony to be "unpersuasive" because of the witness' "high" level of expertise. (ID at 215).

> of the ZODIAC/Mark I system was an incorrect legal basis for a conclusion of non-anticipation under 35 U.S.C. § 102(g). For purposes of anticipation under section 102(g), personal knowledge by the patentee of the prior invention is not necessary. (footnote omitted) (Petition Appendix at A-26).

The above citations and references clearly indicate that, contrary to Qume's assertions, reasoned explanations for rejecting the ALJ's conclusions were offered and that the Commission's conclusions of invalidity of Claims 1 and 8 did not rest in either instance upon the testimony of a single witness. It was, therefore, legal error and not demeanor-based credibility which was at issue herein.

Qume ignores these legal errors and instead selectively cites portions of *Universal Camera* and *Jackson v. Veterans Administration*, 768 F.2d 1325 (Fed. Cir. 1985), which only address the validity of an agency's decision when it is inconsistent with the demeanor-based credibility determinations of the trier of fact. However, since witness credibility was not in issue below, Qume's reliance is the proverbial "red herring" and is misplaced.[5]

---

[5] In its brief to the Federal Circuit, Qume failed to cite to either *Universal Camera* or *Jackson*. In its reply brief, presumably because Respondents had raised the issue in their brief, Qume briefly and selectively quoted from *Universal Camera*. More significantly, however, Qume, in its petition for rehearing and request for an *en banc* hearing to the Federal Circuit, cited to neither *Universal Camera* nor to *Jackson*. It would seem that if the universally applicable standard which Qume claims is set forth in these two cases actually exists and is applicable herein, Qume, at a minimum, would have cited the decisions in its petition for rehearing.

III.

THE COMMISSION'S FINAL DETERMINATION, NOT THE ALJ'S ID, WAS PROPERLY BEFORE THE FEDERAL CIRCUIT AND WAS PROPERLY REVIEWED BY THAT COURT.

Investigations under Section 337 are conducted by the ITC which is charged with its enforcement. 19 U.S.C. § 1337(a). Upon institution of a Section 337 investigation, the Commission, pursuant to its own regulations, will refer the investigation to one of its ALJ's who will conduct the actual investigation and preside over the evidentiary hearing. *See* 19 C.F.R. §§ 210.41(a) and 210.41(f). At the conclusion of the hearing, the ALJ issues an ID. 19 C.F.R. § 210.53.

Upon issuance of the ID, any party may petition the Commission for review or the Commission may *sua sponte* review the ID. 19 C.F.R. §§ 210.54 and 210.55. On review, the Commission has all of the powers which it would have had in making the ID except as it might limit the issues before it by notice or by rule. 19 C.F.R. § 210.56. The Commission review constitutes a *de novo* proceeding.[6] On review, the Commission may affirm, reverse, modify, set aside or remand, in whole or in part, the ID of the ALJ and make any findings or conclusions which in its judgment are proper based on the record in the proceeding. 19 C.F.R. § 210.56(c). The Commission's authority on review is consistent with the provisions of the APA. 5 U.S.C. § 557(b).

---

[6] Even then-Vice Chairman (now Chairman) Liebeler, upon whose dissenting opinion Qume so heavily relies, recognized that, "'Once review is granted, however, all aspects of the case are reviewed *de novo* by the Commissioners." (Petition Appendix at A-77).

The Commission's Final Determination constitutes the findings of fact and conclusions of law of the Commission. In light of its own regulations and Sections 337(b) and (c), which provide that *the Commission* shall investigate any alleged violation of the statute and that *the Commission* shall determine whether or not there is a violation, it is the Commission, not the ALJ, that is the statutory finder of fact.

Because Qume prefers the ID written by the ALJ to the Final Determination issued by the Commission, it has conveniently ignored the fact that the Final Determination, not the ID, constitutes the agency's action. In fact, Qume erroneously castigates the Federal Circuit for having reviewed the Commission's Final Determination instead of the ID. In so doing, Qume has ignored the Commission's statutory function. Nowhere is this more evident than in Qume's repeated assertion that the Federal Circuit "has interjected its own judgment in a patent case for that of the trier of fact" (Petition at 9), or failed to "limit its activity to proper appellate review of factual findings made below."[7] (Petition at 17).

The errors inherent in Qume's argument are (1) that it ignores the fact that the Federal Circuit prop-

---

[7] In so doing, Qume cites with regularity to this Court's decision in *Dennison Manufacturing Co. v. Panduit Corp.*, ___ U.S. ___, 106 S. Ct. 1578 (1986). However, Qume ignores the fact that this Court's actions in *Dennison* stemmed from the Federal Circuit having *reversed* the finder of fact (the district court) without explicitly explaining why it did so in accordance with Rule 52(a) of the Federal Rules of Civil Procedure. Here, the Federal Circuit did not substitute its own judgment for that of the fact finder (the ITC), it *affirmed* that body's decision.

erly reviewed and affirmed the factual findings made below *by the Commission* and (2) that it raises an administrative delegation of function to the ALJ into a statutory grant of authority. It was the Commission's Final Determination, including the findings and conclusions incorporated therein, which was properly before the Federal Circuit for review and which was affirmed by that court. Neither Section 337, the APA, nor any of the cases cited by Qume suggests a contrary result.

IV.

THE FEDERAL CIRCUIT'S OPINION DOES NOT DISCOURAGE RESORT TO SECTION 337.

The Federal Circuit's opinion neither has the universal significance nor the negative implications suggested by Qume. The decision on appeal merely affirms prior Federal Circuit decisions in which the standard of review of ITC decisions had been extensively discussed. *SSIH Equip. S.A. v. United States Int'l Trade Comm'n*, 718 F.2d 365 (Fed. Cir. 1983); *General Motors Corp. v. United States Int'l Trade Comm'n*, 687 F.2d 476 (CCPA 1982), *cert. denied*, 459 U.S. 1105 (1983).[8] The Federal Circuit's decision properly recognized the relationship between the decisions of the Commission and those of its ALJ's, thereby recognizing longstanding precedent as it relates to administrative law and procedure. Finally, the Federal Circuit's opinion merely reaffirmed statutory and

---

[8] The Court of Appeals for the Federal Circuit was substituted for the Court of Customs and Patent Appeals as the Commission's reviewing court by virtue of the Federal Courts Improvement Act of 1982, Pub. L No. 97-164, § 163(a), 96 Stat. 25 (1982).

judicial authority as it relates to patent validity. Respondents submit, therefore, that the consistency of approach evidenced by the Federal Circuit's opinion in this case cannot conceivably make "resort by a patent owner to the processes of the ITC a precarious venture." Instead, it is this consistency that should be the benchmark against which appellate decisions should be measured.

CONCLUSION

The Federal Circuit correctly applied the appropriate standard of appellate review in affirming the underlying Final Determination of the ITC. The standard applied by the Federal Circuit is consistent with established precedent of that court. Moreover, the standard applied by the Federal Circuit is consistent with this Court's decisions regarding appeals from administrative agencies. Thus, Qume's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Counsel for Respondents
Triumph-Adler Aktiengesellschaft, Adler-Royal Business Machines, Inc., Nakajima All Co., Ltd., Sharp Corporation and Sharp Electronics Corporation

TOM M. SCHAUMBERG, ESQ.
(*Counsel of Record*)
JOEL D. KAUFMAN, ESQ.
ALICE A. KIPEL, ESQ.
HOWREY & SIMON
1730 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4793
(202) 783-0800

Counsel for Nakajima All Co., Ltd.	FREDERICK G. MICHAUD, JR., ESQ. BURNS, DOANE, SWECKER & MATHIS George Mason Building Washington & Prince Streets Alexandria, VA 22313 (703) 836-6620
Counsel for Sharp Corporation and Sharp Electronics Corporation	TERRELL C. BIRCH, ESQ. BERNARD L. SWEENEY, ESQ. BIRCH, STEWART, KOLASCH & BIRCH 301 North Washington Street Falls Church, VA 22046 (703) 241-1300
Counsel for Triumph-Adler Aktiengesellschaft and Adler-Royal Business Machines, Inc.	JOSEPH R. SPALLA, ESQ. 82 Hopmeadow Street P.O. Box 2000 Simsbury, CT 06070 (203) 651-0911

Dated: March 6, 1987

APPENDIX

APPENDIX

5 U.S.C. § 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

* * *

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554 (d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in

which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

* * *